



Respondent specifically denies an each and every working day aggravation of that injury as alleged by claimant. Accordingly, the issues for Appeals Board review are as follows:

1. Did claimant sustain personal injury by a series of accidents each and every working day after May 6, 1996?
2. If so, did claimant give timely notice of accident? Specifically, did claimant give timely notice of any injury by accident that occurred after May 6, 1996?
3. What is the nature and extent of claimant's disability, if any?
4. What is claimant's date of accident? Specifically, did claimant suffer any permanent worsening of his May 6, 1996 injury from his work activities after that date or, instead, did claimant suffer a subsequent intervening injury that was not work related?

#### **FINDINGS OF FACT**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) Claimant injured his low back at work on May 6, 1996. He was treated and released without restrictions on May 18, 1996, and returned to his regular job duties with respondent. Claimant continued to perform his regular work activities until April 22, 1997. Claimant had worked part of that day when he radioed his employer and requested the rest of the day off to see his chiropractor.
- (2) Claimant alleges an each and every working day aggravation of his May 6, 1996 low back injury through April 22, 1997, his last day worked. Respondent contends claimant suffered an intervening injury off the job and that such non-work-related injury was the cause of claimant's acute onset of symptoms in April 1997.
- (3) Between his release in May of 1996 and April 22, 1997, claimant performed his regular job duties without complaining of back pain and without exhibiting any appearance of the work causing him pain. Claimant voluntarily worked overtime and also regularly engaged in strenuous physical activities away from work, including driving his vehicle overland while coyote hunting and mowing lawns for people. Claimant did not seek medical treatment for his back between his May 18, 1996 release by Dr. Jerry Bryan and his last day of work on April 22, 1997. Although claimant saw several physicians during this period for unrelated injuries, claimant never mentioned having low back pain to those physicians.

(4) Claimant was treated by Jerry L. Bryan, D.C., for his May 6, 1996 injury. Dr. Bryan's treatment records show that claimant made steady improvement from that injury and that claimant was symptom free when Dr. Bryan released him without restrictions on May 18, 1996.<sup>1</sup> In addition, claimant did not have any radicular symptoms or complaints of leg pain following the May 6, 1996 injury. But when claimant saw Dr. Bryan again on April 23, 1997 claimant was experiencing acute pain with muscle spasms and tenderness in his low back and pain into his leg.

(5) Although claimant denies it, his employer, Harold Schwien, and Bobbie Schwien both testified that when claimant called them on April 22, 1997 he described his back injury as not work related. Mr. Schwien said claimant reported injuring his back lifting a timber in his yard. Mrs. Schwien described having a similar telephone conversation with claimant.

(6) The only expert medical opinion relating claimant's present symptoms and impairment to his work was given by orthopedic surgeon C. Reiff Brown, M.D. But, Dr. Brown based his opinion on the history given to him by claimant to the effect that claimant suffered from ongoing back pain on a regular basis with activity after May 6, 1996. The testimony of claimant's coworkers and the records of the health care providers claimant saw between May 18, 1996 and April 22, 1997 do not support this history. The Appeals Board finds that claimant did not suffer from severe back pain on an ongoing basis after being released from treatment and returning to work on May 18, 1996. Accordingly, the opinion by Dr. Brown as to the cause of claimant's condition is of little value.

#### **CONCLUSIONS OF LAW**

(1) Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

(2) "In a workers compensation action, where the permanency of a claimant's condition does not result from a work-related injury, the claimant's employer is not liable for permanent partial disability benefits." West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, Syl. ¶ 4, 859 P.2d 382 (1993).

(3) The Appeals Board finds that claimant suffered a work-related injury on May 6, 1996, but that this injury was only temporary. When claimant returned to work on May 18, 1996, he was without restrictions and had no permanent impairment. Claimant has failed to prove that his work activities after that date caused a permanent worsening

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<sup>1</sup> After his release, claimant did not return to Dr. Bryan until September 12, 1996. But when claimant eventually did see Dr. Bryan again in September 1996 it was for his upper back and neck. Claimant made no mention of low back complaints. It was not until the April 23, 1997 visit that claimant again made complaints concerning symptoms in his low back. Likewise, when claimant treated with Allen McLain, D.O., in October 1996 for a cold and in January 1997 for an injury to his toe, claimant never mentioned having any low back problems.

of his condition. Therefore, permanent partial disability benefits are denied. Claimant is entitled to an award of compensation, including medical treatment benefits, for the May 6, 1996 injury only. Claimant's entitlement to those benefits ended when he was released to return to work without restrictions on May 18, 1996.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the December 11, 1998 Decision and the December 18, 1998 Order Nunc Pro Tunc should be modified to an award of compensation in favor of the claimant, Clifford Sunley, and against the respondent, Schwien Tank & Lease Service, and its insurance carrier, Employers Mutual Casualty Company, for an accidental injury which occurred May 6, 1996, for medical treatment and .57 weeks of temporary total disability compensation ending May 18, 1996.<sup>2</sup>

The Appeals Board adopts the remaining orders contained in the ALJ's Decision not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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c: M. John Carpenter, Great Bend, KS  
James M. McVay, Great Bend, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director

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<sup>2</sup> K.S.A. 44-510c(b)(1) provides that no temporary total disability compensation is to be paid for the first week of disability unless the temporary total disability exists for three consecutive weeks.